



FCC MAIL SECTION

May 26, 1992

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Office of the Secretary
Federal Communications Commission
1919 M St. N.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Secretary:

This letter provides public comment pursuant to the F.C.C. Notice of Proposed Rulemaking in connection with the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90.

West Marketing Services, Inc., a Texas Corporation, licenses CelShare (TM), a computerized market research program, to several domestic cellular telephone carriers (service providers) for the purpose of measuring the licensees' share of cellular customers in given cellular markets.

The software runs on a desktop computer and automatically dials a random sample of telephone numbers in user-specified cellular telephone exchanges. The program "listens" to cellular telephone company messages and determines whether the number is active or inactive.

The purpose of the program is solely to estimate the total number of active working telephone numbers in a given cellular exchange, not to solicit business or to collect debts. No announcement of any kind is ever conveyed by the device.

To minimize actually reaching any cellular customers, the device typically operates in the middle of the night (i.e., between 11:00pm and 6:00am) when most people are unlikely to be in their vehicles and the ring count is set low (usually two rings or less). As a result, live contacts are rarely encountered. Internal research shows that approximately three live connections are made for every 1,000 calls. Should a cellular subscriber answer the phone, the device disconnects immediately.

The device generates reports showing the total number and percentage of active and inactive telephone numbers in each exchange. It can also generate a listing of the actual telephone numbers that are active.

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The CelShare program provides an essential primary market research function for cellular telephone carriers in that market share data is not otherwise available to them from secondary industry sources or syndicated services (e.g., Neilsen, SAMI, etc.)

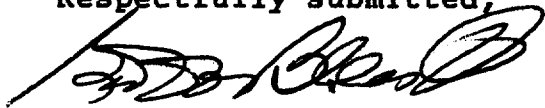
Various state Public Utilities Commissions (P.U.C.'s) have exempted the CelShare program from their definitions of automatic dialing devices due to the fact that the program does not play sales messages. Copies of letters from the Texas and California P.U.C.'s are attached.

The Telephone Consumer Protection Act of 1991, however, does not refer to the ability of the equipment to play messages in its definition of automatic telephone dialing systems, nor to the purpose of the call (e.g., market research).

It is our understanding that the Act arose from Congress' desire to regulate telemarketing activities and protect cellular customers from blatant invasion of privacy. The CelShare program is in no way involved in telemarketing nor does it represent an invasion of privacy.

To the extent that the CelShare program performs a legitimate and necessary market research function, does not play sales messages or attempt to sell anything, and makes a concerted effort to minimize and avoid live connections, we believe the CelShare program should be allowed to continue to operate under the new law.

Respectfully submitted,



Geoffrey B. West
President, West Marketing Services, Inc.

PUBLIC UTILITIES COMMISSION

305 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 15, 1992

RECEIVED BY

Geoffrey B. West
President
West Marketing Services, Inc.
P.O. Box 181
Summerland Key, Florida 33042

Dear Mr. West,

This is in response to your March 26, 1992 letter regarding the legality of using an automatic dialing device to call cellular telephone numbers in California for marketing research purposes.

In your letter you state that the automatic dialing device runs on a desktop computer and automatically dials numbers in user-specified cellular telephone exchanges. The purpose of doing this is solely to determine the total number of active working telephone numbers in a given cellular exchange, and not to solicit business or collect debts. No announcement of any kind is conveyed by the device. The device typically operates in the middle of the night when, according to your letter, people are unlikely to be in their vehicles. Thus, voice contacts are rarely encountered. If a cellular subscriber answers the phone, the device disconnects immediately.

The device generates reports showing the total number and percentage of active and inactive telephone numbers in each exchange. It can also generate a listing of the actual telephone numbers that are active.

The use of automatic dialing-announcing devices is governed by California Public Utilities Code sections 2871 to 2876. I have enclosed a copy of these provisions for your convenience. Public Utilities Code section 2871 defines an "automatic dialing-announcing device" as "any automatic equipment which incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called and the capability, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone called." (Emphasis added.) When I spoke to you on April 23, 1992, you stated that the device you wish to use to call cellular telephone numbers in California does not have the capability of disseminating a message. Under these circumstances, it does not appear that Public Utilities Code section 2871 et seq. would apply to the device that you intend to use.

You further stated in our telephone conversation that the intent of your activity is to avoid any contact with the caller. You

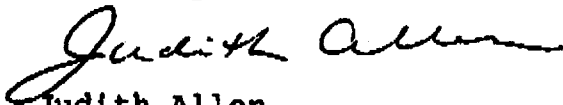
Geoffrey B. West
May 15, 1992
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stated that the ring count on the device is set so that the device will get an "inactive" message or disconnect prior to a person answering the phone, and, as stated above, the device places calls at night in order to avoid contact.^[1] On average, three contacts are made out of 1,000 calls.

The purpose of this letter is only to give you an informal opinion regarding the applicability of Public Utilities Code 2871 et seq. to your proposed activity. You should be aware that there may be federal laws which relate to the use of this device for the purposes stated.

I hope that this information is of assistance to you. The informal opinions contained in this response are those of the Commission's Legal Division staff and are not binding on the Commission, which issues opinions only in formal proceedings. Please feel free to contact me at (415) 703-2053 if you have further questions regarding this matter.

Sincerely,



Judith Allen
Public Utilities Counsel

JA:lw

Enclosure

1 Under the statutory provisions, automatic dialing devices cannot be operated to place any calls which are received between the hours of 9 p.m. and 9 a.m. (Pub. Util. Code § 2872(c).) However, as stated above, it does not appear that the statute applies to the device you are proposing to use.



Public Utility Commission of Texas

7800 Shoemaker Boulevard · Suite 400N
Austin, Texas 78757 · 512/458-0100

Jo Campbell
Commissioner

Marta Greytak
Commissioner

Paul D. Meek
Chairman

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 23, 1990

RECEIVED BY

Geoffrey B. West
President
West Marketing Services
326 Easy Street
Little Elm, Texas 75068

Dear Mr. West:

This is response to your letter of January 16, 1990 concerning the legality of using an automatic dialing device for market research. The Public Utility Commission of Texas ("PUC") regulates the use of automatic dial announcing devices ("ADADs") under Section 87B of the Public Utility Regulatory Act, Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1989) and a PUC rule. 16 T.A.C. 23.32. I have enclosed copies of each of these regulations.

Based on the description that you have given of your device, I do not believe these regulations would apply to the device. Your device does not convey any messages or announcements to the called person. I do not know whether the device is capable of conveying messages in conjunction with other equipment which would technically bring it under the definition of ADAD and thereby subject it to regulation. I understand from your letter and from our telephone conversations, however, that you have no intention of using the device to convey messages. So long as this remains your intention, the General Counsel's office will not seek the registration of your device.

If in the future you do use the device (or any other device), alone, or in conjunction with other equipment, to convey messages, you must file an application with the PUC for a permit.

The General Counsel would also like to be informed if you ever expand the use of your device beyond the cellular telephone market.

Sincerely,

Becky Bruner

Becky Bruner
Assistant General Counsel

BB/lb